Soon Keng Sdn Bhd v Low Chee Hoong & Ors

HIGH COURT (IPOH) — CIVIL APPEAL NO 12-67 OF 1996
PS GILL J
2 AUGUST 2001

Civil Procedure *— Adjournment — Refusal — Judgment to plaintiff — Duty of presiding judge to allow counsel sufficient time to proceed with next course of action — Whether presiding judge could proceed forthwith without giving defendant or counsel chance to be present — Whether defendant's only recourse was to appeal against order — Subordinate Courts Rules 1980 O 29 r 14*

The defendant and his counsel failed to appear in court to defend an action against him. The sessions judge disallowed any further adjournment on this action and proceeded to hear the plaintiff's claim. Judgment was subsequently given in favour of the plaintiff. The defendant's counterclaim was struck out. The defendant then took immediate steps to set aside the judgment. The issue was whether the judge had the jurisdiction to hear the application bearing in mind that he had heard viva voce evidence in respect of the plaintiff's claim before entering a judgment in favour of the plaintiff. It was argued by the plaintiff on a preliminary objection that the judge had no power to hear the application. The only recourse for the defendant was apparently to appeal against the decision. It was against this decision that an appeal was filed by the defendant.

Held, allowing the appeal:

(1) When disallowing adjournments in such circumstances, sessions court judges and presiding officers alike should allow counsels so requesting the adjournment sufficient time to be informed that the adjournment has been refused, so that instructions could be given on to the next course of action. To proceed forthwith with the hearing without giving counsels the opportunity to take stock of the situation is punitive, and would deprive a case to be properly heard on its merits (see p 242D–E).

(2) The court had no qualms about upholding the learned sessions court judge's discretionary powers in refusing to grant the adjournment. He had in mind the many circulars in respect to the granting of adjournments. The court's only anxiety was that he should have paused after intimating to the requesting counsel that he was disallowing the adjournment, so that steps could be taken by the requesting counsel to assign another counsel to attend to the matter. In this context, the learned sessions court judge was overly hasty in his approach in proceeding with the hearing forthwith without giving the defendant/appellant, and counsel, a chance to be present (see p 243D–E).

(3) It is within the province of the court to entertain an application under O 29 r 14 of the Subordinate Courts Rules 1980 ('the SCR'), despite evidence being led by the plaintiff and a judgment

entered. The learned sessions court judge fell into error by holding that because he had heard evidence of the plaintiff and entered judgment in favour of the plaintiff, the only recourse was for the defendant to appeal against the order. Order 29 r 14 of the SCR has no such limitations and the court is fortified by the decision in *Hup San Timber Trading* [1979] 1 MLJ 238. On this ground alone, the appeal should be allowed (see p 244A–C).

[Bahasa Malaysia summary

Defendan serta peguam beliau gagal hadir di mahkamah untuk membela satu tindakan terhadap beliau. Hakim mahkamah sesyen tidak membenarkan apa-apa penangguhan ke atas tindakan ini dan mulai membicarakan tuntutan plaintif. Penghakiman seterusnya dicatat memihak kepada plaintif. Tuntutan balas defendan dibatalkan. Defendan kemudiannya mengambil langkah segera untuk mengetepikan penghakiman tersebut. Isu sekarang adalah sama ada hakim mempunyai bidang kuasa untuk membicarakan permohonan tersebut dengan pengetahuan bahawa beliau telah membicarakan keterangan viva voce berkenaan tuntutan plaintif sebelum menyampaikan penghakiman memihak plaintif. Adalah dihujahkan oleh plaintif dalam bantahan awalnya bahawa hakim tidak mempunyai bidang kuasa untuk membicarakan permohonan tersebut. Jalan keluar tunggal bagi defendan tampaknya adalah dengan merayu menentang keputusan tersebut. Defendan memfailkan rayuan bagi tujuan menentang keputusan tersebut.

Diputuskan, membenarkan rayuan tersebut:

(1) Ketika melarang penangguhan dalam keadaan sebegini, hakim-hakim mahkamah sesyen dan pegawai penghakiman pada ketika itu patut membenarkan para peguam yang memohon penangguhan masa yang mencukupi untuk diberitahu bahawa penangguhan tersebut telah ditolak, supaya arahan boleh diberikan bagi tindakan yang seterusnya. Tindakan meneruskan perbicaraan tersebut tanpa memberikan peguam-peguam peluang untuk memahami situasi tersebut bersifatkan hukuman dan dapat menyebabkan hilangnya peluang sesuatu kes dibicarakan dengan sepatutnya atas merit (lihat ms 242D–E).

(2) Mahkamah tidak mempunyai apa-apa keraguan dalam mengesahkan kuasa budibicara hakim mahkamah sesyen yang menolak permohonan penangguhan. Beliau sedar akan pelbagai surat pekeliling dalam permohonan penangguhan. Mahkamah hanya risau bahawa beliau seharusnya berhenti seketika setelah memberitahu peguam bahawa beliau telah tidak membenarkan penangguhan yang dipinta, supaya langkah-langkah dapat diambil oleh peguam tersebut untuk menugaskan seorang peguam lain untuk mengendalikan perkara tersebut. Dalam

konteks ini, hakim mahkamah sesyen terlalu terburu-buru dalam pendekatannya ketika memulakan perbicaraan tersebut tanpa memberikan defendan/perayu dan peguam, peluang hadir di mahkamah (lihat ms 243D–E).

(3) Memang ada dalam bidang kuasa mahkamah untuk melayan satu permohonan di bawah A 29 k 14 Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR'), walaupun keterangan telah diberi oleh plaintif dan penghakiman telahpun dicatat. Hakim mahkamah sesyen tersebut telah membuat kesilapan apabila memutuskan bahawa oleh kerana beliau telah membicarakan keterangan plaintif dan mencatat penghakiman yang memihak plaintif, jalan keluar tunggal bagi defendan adalah dengan merayu menentang perintah tersebut. Aturan 29 k 14 KMR tidak mempunyai batasan sedemikian dan keputusan mahkamah ini dipertahankan oleh keputusan dalam *Hup San Timber Trading* [1979] 1 MLJ 238. Berasaskan hujahan ini sahaja, rayuan ini patut dibenarkan (lihat ms 244A–C).

Notes

For cases on refusal of adjournment, see 2(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 181–183.

Cases referred to

Hup San Timber Trading Co Sdn Bhd v Tan Ah Lan [1979] 1 MLJ 238 (refd)
Redditch Benefit Building Society v Roberts [1940] 1 All ER 342 (refd)
Smith v Middleton [1972] SC 30 (refd)
Tan Ah Yeo & Anor v Seow Teck Ming & Anor [1989] 2 MLJ 3 (refd)

Legislation referred to

Subordinate Courts Rules 1980 O 28 rr 6, 8(1), (2), O 29 r (14), O 53 r 11

Roshan Kumar (*Ng Yook Woon, Andrew TC Saw & Co*) for the plaintiff.
VS Viswanathan (*VS Viswanathan & Co*) for the defendant.

PS Gill J. : The appellant/defendant Soon Keng Sdn Bhd and his counsel had failed to appear at the sessions court, Ipoh on 17 October 1996, to defend an action against him by the plaintiff/respondent. The learned sessions court judge had disallowed any further adjournment on this said action, and proceeded to hear the plaintiff's claim, in respect of the said action. Judgment was subsequently given in favour of the plaintiff/respondent. The counterclaim of the defendant/appellant was struck out. On realizing that a judgment had been obtained against them, the defendant/appellant took immediate steps to set aside the judgment pursuant to the powers of the Subordinate Court Rules 1980 ('the SCR')

under O 28 rr 8(1) and (2) and O 29 r (14). The ever recurring question emerged at the hearing of the said application, as to whether the learned sessions court judge had the jurisdiction to hear the said application, to set aside the judgment of 17 October 1996, bearing in mind that the learned sessions court judge had heard viva voce evidence in respect of the plaintiff's claim, and proceeded only then to enter judgment in favour of the plaintiff. Before the learned sessions court judge, it was argued by the plaintiff/respondent on a preliminary objection in respect of this application to set aside the judgment, that the learned sessions court judge had no power to hear the said application, as the court was basically 'functus officio'. Evidence had been led on behalf of the plaintiff's case, and a decision consequently made. The only recourse for the defendant/appellant was apparently to appeal against the said decision of 17 October 1996.

The learned sessions court judge, in his terse written judgment, had agreed with the plaintiff/respondent counsel's submission that the said application was inappropriate, bearing in mind that he had heard the plaintiff's case. As such, the proper course should have been for the defendant/appellant to appeal against the said decision. For ease of reference, I shall reproduce the judgment of the learned sessions court judge in respect of encl (33).

> Memandangkan penghakiman yang diberi oleh Mahkamah adalah berdasarkan keterangan yang telah diberi oleh pihak plaintif dan hujah yang dikemukakan oleh Peguamcara Plaintif maka Mahkamah berpendapat prosedur yang betul untuk diambil oleh defendan ialah merayu kepada Mahkamah Tinggi terhadap keputusan tersebut dan bukan membuat permohonan di Mahkamah ini untuk ketepikan penghakiman tersebut.
>
> Pada peringkat ini Mahkamah ini adalah 'functus officio'.
>
> Oleh itu Mahkamah membenarkan bantahan awal oleh Peguamcara Plaintif.
>
> Permohonan dalam Lampiran (33) dibatalkan dengan kos.

It is against this said decision that an appeal was filed by the defendant/appellant.

Before I embark on the law in respect of this appeal, perhaps it is only pertinent for me to discuss the chronology of events that arose prior to the hearing of the application, to set aside the judgment before the learned sessions court judge.

The plaintiff's claim was for a refund of a deposit of RM50,000 which was deposited by the plaintiff, with the defendant, in respect of a mining prospect lease, granted to the plaintiff by the defendant. The plaintiff had prospected, and mined, for a duration of 26 months, and thereafter decided to cease mining, since all the tin ore deposits had been mined. The plaintiff had allegedly done all, that was required of him, as a lessor on completion of mining. Despite requests for the return of the said deposit of RM50,000 the defendant had refused to part with it, citing their reason, that the said lands that were mined were not levelled as part of the agreement.

From the record of proceedings, this action had a chequered history. The action came up for hearing initially on 25 October 1989, wherein it was struck out as the plaintiff, and his counsel, were not present. The action was subsequently restored. Adjournments were granted subsequently for a variety of reasons, at the request I hasten to add of both plaintiff and defendant counsels. Eventually, an application was filed for summary judgment by the plaintiff, and this was dismissed on 16 December 1994, and the matter was then set down for trial. Subsequently further adjournments were granted, at the request once again of both counsels, and the matter was eventually fixed for hearing on 17 October 1996. On the said date, the plaintiff's counsel informed the court that the defendant's counsel was engaged in a case at the High Court Shah Alam, and requested the case to be adjourned. In all fairness to the plaintiff's counsel, he had intimated to the court that he had no objections to the said adjournment, but evidentially the learned sessions court judge disallowed any further adjournments, and proceeded forthwith to hear the matter. I can well understand the consternation and subsequent reaction of the learned sessions court judge to this 'eleventh hour' adjournment, as this action has been registered since 1989. However, I would exhort learned sessions court judges, and presiding officers alike, that in future, when disallowing adjournments in such circumstances, the court should allow counsels so requesting the adjournment sufficient time to be informed, that the adjournment has been refused, so that instructions could be given, on to the next course of action. To proceed forthwith with the hearing without giving counsels the opportunity to take stock of the situation is with respect punitive, and would deprive a case to be properly heard on its merits.

This is a factual narrative of the events that lead to the filing of the application encl (33).

And now to the law in respect of absence of counsel and parties at the date of hearing.

Order 28 r 6 of the SCR reads as follows:

> Where defendant does not appear (O 28 r 6)
>
> (1) If, when an action, other than actions to which O 43 and 45 apply, is called on for hearing, the plaintiff appears but the defendant does not appear, the court may:
>
> (a) if the defendant has no counterclaim, on proof of service give judgment for the plaintiff on his claim; and
>
> (b) if the defendant has a counterclaim, dismiss the counterclaim with costs; and make any other order as it thinks just.

Order 29 r 14 of the SCR reads as follows:

> Setting aside or varying judgments and orders (O 29 r 14)
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> Where in these rules provisions are made for the setting aside or varying of any order or judgment, a party intending to set aside or to vary such order or judgment must make his application to the court and serve it on the party who has obtained the judgment within 30 days after the receipt of the order or judgment.

A The effect of O 28 r 6(1) of the SCR is that if the defendant does not appear when the action is called on for hearing, and if the defendant has a counterclaim, upon proof of service the court may give judgment to the plaintiff, and may dismiss the counterclaim. It is a discretion of the court, and the plaintiff is not entitled to judgment as of right. Apart from this course of action, the court has a discretion to adjourn the hearing to another B date by giving costs of the day to the plaintiff. If the defendant does not appear, but his counsel does, the court may adjourn the hearing to a date by compensating the plaintiff with costs, and ought not give judgment in default (see *Redditch Benefit Building Society v Roberts* [1940] 1 All ER 342 (CA)).

C The discretionary powers of the court in the granting, or not, of adjournments, is very wide and is in no way fettered, but is amplified by virtue of O 53 r 11 of the SCR. In exercising this discretion, the court ought to ensure that it is judicially exercised, or in the phrase used by Lord Emslre in *Smith v Middleton* [1972] SC 30 'in a selective and discriminatory manner not arbitrarily or idiosyncratically…' for otherwise the results of the parties D to litigation would become dependent on judicial whims.

In respect of the present instance, I have no qualms about upholding the learned sessions court judge's discretionary powers in refusing to grant the adjournment. He had in mind the many circulars in respect to the granting of adjournments. My only anxiety as I mentioned earlier on, was E that he should have paused after intimating to the requesting counsel that he was disallowing the adjournment, so that steps could be taken by him (requesting counsel) to assign another counsel to attend to the matter. In this context I feel the learned sessions court judge was overly hasty in his approach in proceeding with the hearing forthwith without giving the defendant/appellant, and counsel, a chance to be present. To this extent, I F feel the learned sessions court judge's approach was slightly askew. Having said I have not failed to note that it was presumptuous and rather cavalier of the defendant/appellant counsel in not ensuring at least that his client/ defendant was in court on 17 October 1996.

On the issue of whether O 29 r 8 of the SCR is applicable, from my G reading of the said section, it is apparent that where a party is prevented from appearing when the action is called up for hearing, but shows sufficient cause to the satisfaction of the court the reasons for his absence, the judgment should be set aside. See *Redditch Benefit Building Society v Roberts* and *Hup San Timber Trading Co Sdn Bhd v Tan Ah Lan* [1979] 1 MLJ 238. In *Hup San Timber Trading* the defendant and defence counsel was absent H without leave of court, and the plaintiff was allowed to adduce evidence and to sign judgment. Wan Sulaiman FJ (as his Lordship then was) in delivering judgment of the court had this to say:

> No doubt failure by the appellant to obtain a medical certificate containing the appropriate information in a form so prescribed as to remove suspicion that I he was trying to delay proceedings has inclined the learned trial judge to allow this rather drastic measure. But it seems to us that in this instance the judge was in some doubt as to the real reason behind his inability to attend court. On occasions of doubt such as the present one the guiding principle should be

that both parties should be given an opportunity to be heard. Any delay occasioned by what appears to be an inadequate reason for absence can be compensated by an award of appropriate cost.

It would seem from the tenor of these authorities that it is within the province of the court to entertain an application under O 29 r 14 of the SCR, despite evidence being led by the plaintiff and a judgment entered. The learned sessions court judge fell into error in this instance, by holding the view that because he had heard evidence of the plaintiff and entered judgment in favour of the plaintiff, the only recourse was for the defendant to appeal against the said order. It is my considered view that O 29 r 14 of the SCR, has no such limitations and I am fortified by the decision in *Hup San Timber Trading*. On this ground alone, the appeal should be allowed.

It may be pertinent to note that the order of the learned sessions court judge on 17 October 1996, wherein he allowed the plaintiff's claim, and dismissed the defendant's counterclaim, had yet to be sealed, and extracted. On this alone, it was permissible for the court to reopen or recall its judgment before it is entered and perfected. *Tan Ah Yeo & Anor v Seow Teck Ming & Anor* [1989] 2 MLJ 3.

Bearing in mind the above mentioned reasons, I was constrained to allow the appeal and ordered that encl (33) be heard before another sessions court judge.

Appeal allowed.

Reported by Wong Ee Lynn